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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

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SUPREME COURT, U.S.

Nos. 401 AND 414

KONRAD G. JOHANSEN, *Petitioner*,

401 v.

THE UNITED STATES OF AMERICA

(On Writ of Certiorari to the United States Court of Appeals for the Second Circuit)

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, *Petitioner*,

414 v.

THE UNITED STATES OF AMERICA

(On Writ of Certiorari to the United States Court of Appeals for the Third Circuit)

Motion of Cora Mae Meyer, Administratrix of the Estate of Leslie W. Gray, Deceased, for Leave to File Brief in Support as Amicus Curiae in Support of Motion for Rehearing

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Attorneys for Applicant

Of Counsel:
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ALPHA LAW BRIEF CO., HOUSTON

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NOW COMES CORA MAE MEYER, Administratrix of the Estate of Leslie W. Gray, Deceased, and respectfully prays leave to file brief in support of Petitioner's Motion for rehearing, as amicus curiae, in the above captioned case.

Your applicant has requested the written consent of counsel for petitioner in causes Nos. 401 and 414 and of respondent United States of America in the same cases, and it is believed that consent therefor will be filed with the Clerk of this Court by the time this brief is filed, since no reply for such consent has as yet been received.

Your applicant, Cora Mae Meyer, as Administratrix of the Estate of Leslie W. Gray, Deceased, has heretofore obtained judgment in the sum of Eleven Thousand Dollars ($11,000.00) against the United States by reason of the death of the said Leslie W. Gray, a member of the crew of a Public Vessel, the dredge BIDDLE, said death having been caused by the negligence of the owners and operators of the dredge BIDDLE, and the unseaworthiness of its equipment and in other respects more fully set out in the Findings of Fact and Conclusions of Law filed by the Honorable T. M. Kennerly, United States District Court, Houston Division, in accordance with Adm. Rule 46½. (See App. A.) The case is now pending on appeal in the United States Court of Appeals, Fifth Circuit, and is numbered in that court as 13803. One of the principal points upon which the United States, Respondent in cause No. 13803, relies upon for reversal consists of the proposition that "The sole and exclusive remedy of libellant for the death of Leslie W. Gray, deceased, is a claim for compensation benefits under the Federal Employees Act, 5 U. S. C. A., Sec. 751, et seq." The decision of this Honorable Court in Causes No. 401 and 414 vitally affects the Appellee's recovery in behalf of the beneficiary, the aged and dependent Father of Leslie W. Gray, Deceased. It is, therefore, apparent that the result of these cases before the Court may be controlling in Appellee's case, (Cora Mae Meyer, Administratrix,) and, she therefore, has a direct and vital interest therein.

Cora Mae Meyer, therefore, respectfully requests leave to file a brief as Amicus Curiae.

Attorney for Cora Mae Meyer,
Administratrix

BRIEF
for
Cora Mae Meyer, Administratrix, as Amicus Curiae

The opinion of this Honorable Court was rendered on May 26, 1952, with the Honorable Justice Black, the Chief Justice, Justice Douglas and Justice Minton dissenting.

Jurisdiction

The Court has heretofore taken jurisdiction of this case and the matter is therefore properly before it.

Question Presented

Should this Court disregard the plain and unambiguous language of the Act of 1916, 39 Stat. 742, U.S.C., Section 751 et seq., and by drawing from other and unrelated acts of Congress, deprive seamen employees upon public vessels of the United States of the express benefits Congress granted them.

Statement

Ever since the enactment of the original statute, (43 STAT. 1112, 46 U.S.C., Section 781, et seq.) employees on Public Vessels have had their election to sue under the Suits in Admiralty Act. Under such act they were, until this decision, entitled to compensatory damages, invariably exceeding the amount they may be paid under any Compensation Acts including the right to maintenance and cure, or proceed under the Compensation Act. This provision was so well entrenched that no one questioned it until the two cases now before this Court. Relying on such statute, seamen employees on Public Vessels have been permitted to take their pick, i.e., receive compensation benefits or sue for damages.

under the Public Vessels Act, or some other act. In the case in which your applicant Cora Mae Meyer is interested, Leslie W. Gray, deceased, met violent death by reason of negligence of those in charge of the dredge BIDDLE, and the unseaworthiness of its equipment.* Relying on the 30 year old practice of election your applicant took advantage of the more liberal law under the Suits in Admiralty Act, and, therefore, did not file a claim for Compensation but proceeded in a suit in Admiralty, as a result of which judgment in the sum of $11,000.00 was rendered by the trial court. See the District Judge's conclusions of law, Appendix A.

All such persons obviously relying on the 30-year old practice of being entitled to sue under the Suits in Admiralty Act did file such suits under the following authorities:

U. S. v. Loyola (CCA 9th Circuit), 161 F. 2d 126;
Jentry v. United States, 73 F. Supp. 899;
United States v. Marine (CCA 4th Circuit), 155 F. 2d 456.

Thus, your applicant here has relied, as she had a right to rely, on the decisions of the courts—proceeded under the Suits in Admiralty Act and did not file *any* claim for compensation since the filing of a claim would have, under some authorities at least, constituted an election. She, therefore, finds herself in position now that while she had followed the law, yet in view of the decisions of this Court in Causes Nos. 401 and 414, this Court having swept away the rights Congress granted for a cause of action under the Suits in

* Young Gray lost his life when a steel cable which held up a clutch weighing a number of tons parted causing the balance of the wire to reave through a sheave striking Gray causing him to be thrown up into the air and then against the steel deck of the vessel killing him.

Admiralty Act.

Moreover, the decision of this Court has now differentiated and discriminated between Federal employees working as seamen aboard vessels owned by the United States, thus under the Court's opinion employees on merchant vessels of the United States may have the benefit of the Suits in Admiralty Act but not so with the employees on Public Vessels. Actually, there is no difference between the duties, hours worked or conditions of employment. Yet, this Court, in the face of the clear, plain meaning of the statute as enacted by Congress establishes an artificial difference, confusing in its scope, difficult in its application and unrealistic in its contents. It is important for this Court to carefully consider the difference between the Armed Forces of the United States and civil employees. FERRES v. U. S., 340 U.S. 135. Once that difference is understood then the Congressional mandate, Sec. 791, Title 5, U. S. C. A.

(a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.

(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel. Oct. 14, 1949, c. 691, Title III Sec. 305, 63 Stat. 868."

becomes crystal clear and the Court's majority opinion amounts to judicial legislation a matter which under the Constitution this tribunal is prevented from engaging in.

The Court having conceded that the literal language of the Act would allow actions of the nature of those in causes Numbers 401 and 414, there is obviously no ambiguity and,

therefore, no reason for attempting to interpret or construe a statute. Congressional intent must be gathered from the words that Congress has spoken. Such words being clear and unambiguous, this Court has not constitutional right to attempt a construction directly contrary to the words employed by Congress.

Though your Applicant may be but one who would file this brief in Amicus Curiae in support of the Motion for Rehearing there are literally thousands of these cases now pending, and if this decision were to be allowed to stand thousands of widows and other dependents would be deprived of recovery under the suits in Admiralty Act.

Since Section 791, Title 5 specifically excepts seamen as defined in Section 1291 of Appendix to Title 50, i.e. merchant seamen. If Congress had intended only to except merchant seamen, subdivision (b) of Section 791 would not have been enacted. Thus by express legislative action Congress excepted all masters and members of the crew of any vessel from the exclusive remedy of the Compensation Act.

For the foregoing reasons it is respectfully prayed that this Honorable Court grant the Motion for Rehearing heretofore filed in this cause and reverse the decision in Causes No. 401 and No. 414.

Respectfully submitted,

MANDELL & WRIGHT,
200 Republic Building,
Houston 2, Texas,
Attorneys for Applicant

Of Counsel:
ARTHUR J. MANDELL

APPENDIX A

157 FINDINGS OF FACT AND CONCLUSIONS OF LAW PREPARED AND FILED BY THE TRIAL JUDGE UNDER ADMIRALTY RULE 46½

(Filed December 21, 1950)

(Title Omitted)

Statement of the Case.

As tried, this is a suit by L. W. Gray, Administrator of the Estate of Leslie Winston Gray, deceased (called Libellant for brevity), against the United States of America, Respondent, for damages claimed to have resulted from an injury to and the death of Leslie Winston Gray (for brevity called Gray), a member of the crew of the Dredge Biddle, owned and operated by Respondent, on or about July 28, 1949. The damages sought are for the pain and suffering of Gray from the time he received his injuries until his death, damages sustained by Gray's father by reason of Gray's death, and "damages suffered by the Estate" of Gray by reason of his injuries and death. The main trial was on or about October 3 and 4, 1950, but the case was by agreement kept open for other evidence, briefs, etc. until December 15, 1950, on which date it was submitted.

The case was tried on Libellant's Second Amended Libel filed September 28, 1950, but since the main trial, Libellant has filed (December 14, 1950) his Third Amended Libel, in which he in Paragraph IV thereof says:—

"Libellant further alleges that the said dredge BIDDLE was a Public Vessel of the United States, and that

this Libel is instituted under and by virtue of the authority given under the Act of March 9, 1920, Chap. 94, 41 Stat. 525 (Title 46 U.S.C.A., Secs. 741-752), commonly called the Suits in Admiralty Act of March 3, 1925, and Chap. 428, Sec. 1, 45 Stat. 112 (Title 46, U.S.C.A., Secs. 781-790), commonly called the Public Vessels Act; or in the alternative Chap. 20, sections 741 to 752, inclusive, Title 46, U.S.C.A., as well as the Death on the High Seas Act, Title 46, U.S.C.A., Sec. 761, et seq., and the Death Statute of the State of Texas, Art. 4671, Vernon's Annotated Statutes.

Libellant would show that the injuries sustained by the said Leslie Winston Gray which resulted in the death of the said Leslie Winston Gray were caused and brought about by the unseaworthiness of the dredge BIDDLE, its appurtenances, tackle, gear and especially the line or cable to which the ball joint was connected and dependently, as well as through the negligence and carelessness of the Respondent."

Findings of Fact.

(a) Gray, a young unmarried man, received injuries resulting in his death while employed as a member of the crew, i.e., a bin-tender, aboard the Dredge Biddle, owned and operated by the United States of America in navigable waters of the United States. He died intestate and without issue about ten minutes after his injury. The evidence discloses that his injury and subsequent death were without doubt the result of the unseaworthy condition of the Dredge Biddle and the negligence of those in charge of her.

(b) Libellant in Paragraph I of the Libel says that he brings this action:—

"against the Respondent, United States of America, a sovereign power, owner and/or operator of the Dredge BIDDLE, which was then and there a self-propelled

steam vessel operated under the jurisdiction of the Corps of Engineers, Galveston District."

Such allegations are found to be substantially correct.

(c) The following allegations in Paragraph III of Libellant's Libel are found to be substantially true and correct:—

> "Libellant would show your Honorable Court that the Dredge BIDDLE was and still is a self-propelled steam vessel and in excess of 351 feet in length and 60 feet beam, carrying a crew of 79 men having been used and now being used for dredging operation in order to maintain the navigability of the Galveston Harbor."

(d) Libellant has set forth in his brief a substantially correct statement, with slight immaterial variations, of the manner in which Gray was injured, which I adopt and quote it in part (emphasis mine):—

> "The Dredge BIDDLE is a modern seagoing vessel. (Res. Ex. No. 7 & 10). It is equipped with a drag pipe 103 feet in length, weighing a total of approximately forty (40) tons. About one-third of the way from where the pipe comes out from the side of the vessel there is what is known and has been designated as a ball joint. The ball joint itself weighing approximately eighteen (18) tons. (Lib. Ex. No. 1). At the place where the ball joint connects the two pipes it is held up by a block, pulleys and lines. (Res. Ex. No. 6). The end of the pipe known as the drag head is similarly held up. The vessel is equipped with an electrically operated clutch by which clutch the ball joint or drag head is raised or lowered to any desired position. The clutch has not been working properly for many months prior to the fatal day of July 28, 1949, and notice of this condition has been given to and was known by both the Master of the BIDDLE and its Chief Mate Gillikan a long time prior to July 28, 1949.

On the morning of July 28, 1949, the Master ordered the members of the crew to slacken the lines holding the ball joint and to run a line, commonly called a safety line from the davit some twenty-four (24) feet above the ball joint to the ball joint below for the purpose of holding it up while the lines which ordinarily hold it were being re-reaved on the drums on the upper deck. (Lib. Ex. No. 4). About twenty-five or thirty feet aft from where the deceased, Leslie W. Gray was standing, as shown by way of example on Libellant's Exhibit No. 4, there is a fairlead through which the regular lines holding up the ball joint run before they get on the drum. At the end of said fairlead or 'guidesheave stand' there are two heavy steel clips placed there so that the lines may run straight to the drum. The purpose of which is to hold the lines in place in the event of an emergency such as the ball joint falling suddenly, thus stopping the lines running to the drum from suddenly becoming taut and whipping about and possibly injuring anyone nearby. (Testimony of Chief Mate Gillikan and Second Mate Norwell). When the Master ordered the crew to go through such operation without supervision by any officer—Mr. Norwell, the Second Mate being in his bunk asleep and the Chief Officer Gillikan ashore—an unidentified member of the crew put an eighteen (18') foot safety line through the davit above the ball joint, (See Res. Ex. 6) for the purpose of hooking on to a shackle on the ball joint. *Because the clutch was not in working condition and the ball joint could not be raised to where the eighteen (18') foot line could have reached it, it became necessary to obtain another five to six foot 1" wire cable and connect it to the eighteen foot (18') cable and then hook it on to the shackle on the ball joint. While the ball joint was suspended to the so lengthened cable, the six foot (6') line broke in the middle,* (See Lib. Ex. No. 3), causing the eighteen (18) ton joint to suddenly fall a distance of about four feet which in turn jerked the regular lines ordinarily

holding up the ball joint (See Lib. Ex. No. 6) whipping the lines taut, breaking the clips on the fairlead or 'guide sheave stand' and causing the cable to suddenly whip and become taut while Gray was guiding the line on the drum as shown on Libellant's Exhibit No. 4, striking him on the chest, knocking him up against the steel structure overhead, thence to the steel deck, breaking his neck by reason of which, about ten minutes later he died."

(e) I find that Respondent was negligent in the following particulars with respect to the 6-foot cable which was connected to the 18-foot cable, as stated, which acts of negligence were each a proximate cause of Gray's injuries and death, to-wit:—

In that the owner, master, officers and members of the crew were negligent in failing to supply a strong, staunch line or wire cable holding and attached to said ball joint.

In that the owner, master, officers, and members of the crew of said vessel were negligent in failing to use reasonably precautions to ascertain that said line was sufficiently strong to hold the weight of the ball joint.

In that the owner, master, officers and members of the crew of said vessel were negligent in allowing a defective or unseaworthy line or wire cable to be connected to and hold up the said ball joint.

In that the owner, master and officers in charge of the crew assigned to do this particular work were negligent in failing to inspect said extension line before attaching it to the ball joint in order to hold the weight thereof.

In failing to maintain said extension wire cable and chemically treating the same in such a manner that it would not break, part and give way.

In negligently permitting the use of a defective extension line to hold up the weight of the ball joint.

(f) I find that Respondent was negligent in the following particulars with respect to such clutch, which acts of negligence were each a proximate cause of Gray's injuries and death:—

In that the owner, master and officers of said vessel negligently failed to keep the clutch operating said drag pipe in a good working condition.

In negligently failing to test said clutch before leaving out to sea, without first testing that the clutch operating said drag pipe was in proper working condition.

In negligently failing to take the vessel back into Galveston for the purpose of having said clutch repaired instead of using the defective and otherwise unseaworthy line to hold up the ball joint.

In failing to maintain said clutch in a proper working condition so that it could have been used at the time and occasion in question.

(g) I find that Respondent was negligent in the following particulars with respect to such clips, which acts of negligence were each a proximate cause of Gray's injuries and death:—

In failing to have staunch, stout and sufficiently strong clips around the guide sheave stand.

In failing to inspect said clips before lowering the ball joint.

(h) Because of the condition of such 6-foot cable, such Dredge Biddle was unseaworthy.

(i) Because of the condition of such clutch, such Dredge Biddle was unseaworthy.

(j) I find Respondent was negligent in the following

particular as alleged by Libellant, which act of negligence was a proximate cause of Gray's injuries and death:—

> In that the owner, master, officers and members of the crew of said vessel were negligent in failing to supply Libellant a safe place in which to work.

(k) The evidence shows that the 6-foot wire or cable which was attached to the 18-foot wire or cable as stated had previously been spliced by Gray and one Nunnery. But Gray was not guilty of negligence, because the 6-foot cable did not break at the point or points where spliced, but elsewhere. There is nothing to show that Gray was in any way negligent or that he in any way caused the accident or his injury.

(l) Gray's father, L. W. Gray, was almost wholly dependent on him for support, and was damaged by his death and the loss of such support, etc., in the sum of Ten Thousand Dollars ($10,000). Gray lived for about ten minutes after he was injured, and the Administrator of his Estate is suing for damages he sustained by his pain and suffering during such ten minutes. I find such damages to be One Thousand Dollars ($1,000).

Other than the foregoing, no damages, etc. have been shown.

202 SUPPLEMENTAL FINDINGS OF FACT & CONCLUSIONS OF LAW FILED BY THE TRIAL JUDGE

(Filed March 16, 1951)

(Title Omitted)

Statement of the Case.

Reference is made to Findings of Fact and Conclusions of Law filed herein December 21, 1950, and to Supplemental Findings of Fact and Conclusions of Law filed herein January 24, 1951. From these it will be seen that it was held that L. W. Gray, who claimed to be the Adminstrator of the Estate of Leslie Winston Gray, Deceased, was not such Administrator, and could not, therefore, prosecute this suit. But that Cora Mae Meyer, Administratrix of such Estate, has been permitted to intervene and prosecute same. She on January 26, 1951, filed Fourth Amended Libel, and Respondent on February 15, 1951, filed its Answer thereto. Counsel have filed the following Stipulation:—

"January 30, 1951.

Hon. T. M. Kennerly, Judge
United States District Court
Southern District of Texas
Houston, Texas

RE: ADMIRALTY NO. 921—CORA MAE MEYER V. UNITED STATES OF AMERICA

Dear Judge Kennerly:

An order was presented to you pursuant to your Findings of Fact and Conclusions of Law filed Jan-

uary 24, 1951. In accordance with such order Libellant, Cora Mae Meyer, filed her intervention by way of an amended pleading which is now before the Court.

With the exception of introducing in evidence the orders of the County Judge Sitting in Probate of December 27, 1950, and January 8, 1951, certified copies of which are attached to the motion filed January 21, 1951, there is no further evidence that the Libellant wishes to offer; and neither does the United States of America, Respondent, wish to offer any further evidence—both parties stating that there is no further evidence to be offered at this time.

Libellant offers in evidence the orders of the Probate Court attached to the motion filed the 21st day of January, 1951, and respectfully asks the Court to consider the same properly introduced in evidence. In the event the Court desires that we have the Court Reporter mark these instruments as exhibits, we shall be pleased to do so.

In view of the foregoing, it is respectfully requested that the Court consider the case resubmitted as to the issues and matters still undisposed of.

Respectfully yours,

BRIAN S. ODEM
By (Sgd) W. G. Winter, Jr.
Attorney for United States of America, Respondent.

MANDELL & WRIGHT
By (Sgd) Arthur J. Mandell
Attorneys for Libellant, Cora Mae Meyer."

The case has been submitted on Original and Supplemental Briefs.

Findings of Fact.

(a) I adopt the Findings of Fact contained in Findings of Fact and Conclusions of Law filed December 21, 1950, and Supplemental Findings of Fact and Conclusions of Law filed January 24, 1951.

Conclusions of Law.

1: — At the threshold of the case, we are met with the following proposition of Respondent:—

> "The sole and exclusive remedy of Libellant for the death of Leslie W. Gray, deceased, is a claim for compensation benefits under the Federal Employees' Compensation Act (5 U.S.C.A. 751, et seq.)

The cases upon which Respondent relies are Brooks v. United States, 337 U.S. 49. Feres v. United States, 340 U.S. 135. O'Neal v. United States, 11 Fed. (2nd) 869, aff. 11 Fed. (2nd) 871. Posey v. Tennessee Valley Authority, 93 Fed. (2nd) 726. United States v. Marine, 15[illegible] Fed. (2nd) 456. Johnson v. United States, 89 Fed. Supp. 6[illegible]. Frader v. United States (D.C.N.Y. 1950). Federal Employees' Compensation Act. 5 U.S.C.A. 751, et seq.

I do not think any of these cases support Respondent's contention. Also under the evidence, there has been no election to take under such Compensation Act.

2:—Under the foregoing Findings, Libellant is entitled to recover $10,000 damages for the death of Leslie Winston Gray, and $1000 damages for pain and suffering which he underwent before his death.

Judgment will enter for Libellant accordingly. Let proper Decree be drawn and presented.

/s/ T. M. KENNERLY
Judge

205 ORDER FOR JUDGMENT

(Entered March 16, 1951, page 397, Vol. 40, Civil Orders)

"3-16-51: Judgment for Libellant, Cora Mae Meyer, Administratrix of Leslie Winston Gray deceased, for $11,000.00 as per Findings of Fact and Conclusions of Law, and two supplements thereto filed. Clerk will notify counsel to prepare & present appropriate decree within five days. T.M.K."